SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 68

DELVAILLE H. THEARD, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

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—409-3

[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

IN RE DELVAILLE H. THEARD, DISBARMENT PROCEEDINGS

APPEARANCES:

Delvaille H. Theard, in Proper Person.
George R. Blue, Esq., United States Attorney.

Appeal from the District Court of the United States for the eastern District of Louisiana, to the United States Court of appeals for the Fifth Circuit, returnable within forty (40) days from the 6th day of April, 1955 at the City of New Orleans, Louisiana.

[fol. 2] IN UNITED STATES DISTRICT COURT

MOTION OF UNITED STATES TO SUSPEND FROM PRACTICE DELVAILLE H. THEARD AND ORDER GRANTING SAME—Filed May 19, 1954

On motion of George R. Blue, United States Attorney in and for the Eastern District of Louisiana, and on suggesting to the Court that in the proceedings entitled "Louisiana State Bar Association v. Delvaille H. Theard," this being Cause No. 40,891 for the Supreme Court of Louisiana, the Supreme Court of the State of Louisiana on Monday, March 22, 1954, ordered, adjudged and decreed that the name of Delvaille H. Theard, respondent in said cause, be stricken from the roll of attorneys and his license to practice law in Louisiana be cancelled; that on April 26, 1954, the rehearing applied for by the said Delvaille H. Theard was refused, and the decree rendered as aforesaid on March 22, 1954, became executory, all of which will appear more fully from the true copy of the said hearing and decree attached hereto;

And on further suggesting that in connection with the foregoing, it is required under Rule 1(f) of the General Rules of the United States District Court for the Eastern

District of Louisiana that the said Delvaille H. Theard be suspended forthwith from practice before this Honorable Court, and that, unless he show good cause to the contrary within ten (10) days of notice served upon him, as provided, an order of his disbarment be entered;

It is ordered by the court that the said Delvaille H. Theard be and he is hereby suspended from practice before this Honorable Court; and,

[fol. 3] It is further ordered by the court that unless the said Delvaille H. Theard show good cause to the contrary within ten (10) days, an order of his disbarment herein shall be entered.

New Orleans, Louisiana, this 19th day of May, 1954.

(Sgd.) Herbert W. Christenberry, Judge.

Respectfully submitted: (Sgd.) G. R. Blue, United States Attorney.

CERTIFIED COPY OF PROCEEDINGS FOR DISBARMENT BEFORE THE SUPREME COURT OF LOUISIANA—Filed May 19, 1954

SUPREME COURT OF LOUISIANA

No. 40,891

Monday, March 22, 1954.

LOUISIANA STATE BAR ASSOCIATION

versus

DELVAILLE H. THEARD

Proceedings for Disbarment

HAMITER, Justice.

The instant consideration of this disbarment proceeding, instituted by the Committee on Professional Ethics and Grievances of the Louisiana State Bar Association against Delvaille H. Theard, occurs on opposition to the Commissioner's report. Initially, it is well to briefly review earlier phases of the matter.

Under date of February 2, 1950 the Committee gave notice in writing to respondent that it was undertaking an investigation of certain conduct on his part as a member [fol. 4] of the Bar of Louisiana, the communication detailing and specifying some eleven acts of alleged misconduct and further setting forth that he would be afforded the opportunity of being heard and of defending himself before the Committee.

The contemplated hearing was held in the City of New Orleans on June 5 and 6, 1952, at which respondent was present and represented by counsel of his choice; and, by stipulation, it was restricted to a consideration or investigation of specification No. 1 as listed in the above mentioned communication. The charge therein made was that on January 2, 1935, while engaged in the active practice of law in the City of New Orleans, respondent formed the signatures of Olga Wexler and Alys Senn to a promissory note for $20,000; and that subsequently, having *paraphed* it to appear as an authentic mortgage note, he sold this forged instrument for a valuable consideration to Mrs. Annie W. Forsyth, widow of Julius Forsyth.

In opening the hearing the Committee offered proof of the charged forgery and of respondent's having received, from a representative of Mrs. Forsyth, the sum of $12,601.25 for the note. Then respondent, instead of attempting to contradict such proof, admitted that the signatures on the note were in his handwriting; and, further, he sought to establish (by written reports and by his own testimony and that of others) the existence at the time of a mental illness or a form of insanity which rendered him incapable of wilfully committing the forgery and uttering. For example, under examination by his own counsel, he testified in part:

> [fol. 5] "Q. Mr. Theard, the Committee is investigating, as you know, a matter which appertains to a note dated January 2, 1935, which has been offered in evidence as 'Committee's Exhibit 1.' Will you look at that note and tell me what you remember of its execution (Handing note to witness).
>
> A. You showed me that note in your office, Mr. Rivet. Frankly, I don't remember anything about it.

Q. You won't deny that those signatures on that note are in your handwriting?

A. No. I told you so, and you made the admission. I recognize my handwriting in the signatures and the statement of the reduction of the payment of interest. I recognize that that is my handwriting.

Q. Do you remember selling the original of that note to anybody?

A. No."

On completion of the investigation the Committee petitioned this court for the disbarment of respondent, it alleging his guilt of the charge set forth in specification No. 1 as was proved at the hearing held June 5 and 6, 1952

To the petition respondent tendered several exceptions. Particularly, in one he challenged the right of the Committee to maintain the action in view of his mental illness (as assertedly disclosed by the evidence adduced at the Committee hearing) at the time of the misconduct; and in another he pleaded prescription, laches and estoppel in bar of the disbarment. All exceptions, after having been thoroughly considered, were overruled by us. See 222 La. 328, 62 So. 2d. 501.

[fol. 6] In an application for a rehearing the above specifically described exceptions were reurged and, for the first time, respondent further contended that the "taking away of a lawyer's right to practice, after restoration to health, for acts committed during a mental infirmity precluding conscious guilt, would be inimical to Amendment XIV of the United States Constitution, which prohibits the deprivation of a valuable right without due process of law." The application for a rehearing, following due consideration, was denied.

Thereafter, answer was filed, it containing a general denial of the factual allegations on which the disbarment is sought and, additionally, the following affirmative averments:

"Further answering, respondent says that the act charged as misconduct against respondent occurred nearly eighteen years ago; that at that time respondent was suffering from a mental illness which rendered him incapable of

guilty or wilful conduct and deprived him of the ability to distinguish right and wrong; that he carries no recollection of the act charged against him; that at this late date he is without records and other means of defending himself; that numerous witnesses best acquainted with his condition in January of 1935, and theretofore, have died; that a previous Committee considered and had the opportunity to investigate respondent's conduct; that the compulsion to defend himself against said stale occurrence operates to his prejudice, is essentially unjust, and results in depriving respondent of the procedural due process guaranteed by Section 2 of Article 1 of the State Constitution, and by [fol. 7] the Fourteenth Amendment to the Constitution of the United States.

"Since April 1948, respondent has resumed the active practice of law without any complaint levelled at his conduct.

"Respondent finally says that he never at any time consciously violated any law relating to the professional conduct of lawyers and to the practice of law, nor has he ever wilfully violated any rule of professional ethics."

Later, respondent submitted special pleas of prescription and unconstitutionality which merely reiterated and amplified similar pleas theretofore tendered.

On proper motion, after issue had been joined, Mr. John Pat Little, an attorney at law who had engaged in active practice for a period of not less than ten years, was appointed Commissioner to take the evidence in chambers and to report to this court his findings of fact and conclusions of law. Pursuant to the appointment he held a hearing on March 9 1953, in which the greater part of the evidence offered was that introduced in the proceeding conducted by the Committee on June 5 and 6, 1952. Only three witnesses testified before the Commissioner. One was produced by the Committee in further proof of the forgery and uttering and to show that respondent knowingly committed the unlawful acts. The remaining two were called by respondent merely to identify certain records.

After termination of the hearing the Commissioner prepared and filed a lengthy and well considered written report in which he analyzed the evidence, set forth his findings of

fact, and discussed and announced his conclusions of law. [fol. 8] In summarizing the evidence he commented:

"The commission of the wrongful acts by the respondent is established beyond any doubt; it is even conceded in the respondent's brief to the Commissioner. No evidence was produced by counsel for the Committee, nor even offered, to rebut the alleged mental condition of the respondent. It must then, from the record, be held that the respondent was suffering under an exceedingly abnormal mental condition, some degree of insanity."

With respect to the law determined to be applicable, as well as to his conclusions therefrom the Commissioner observed in part:

"It is the gist of the respondent's argument that being without his mental faculties he was without volition or control over his actions, and, therefore, cannot be guilty of misconduct. * * * This feature of the case rests squarely upon the question of whether, or not, the defense of insanity is sufficient to prevent this Court from disbarring a lawyer who has been found guilty of having forged and uttered a promissory note. * * *

"* * * *

"Having in mind the Court's decision on the exceptions found in 62 So. (2nd) 501 and particularly the portion thereof relating to respondent's exceptions based upon insanity on page 503, the Commissioner is constrained to find that the law as expressed in that opinion does not relieve the respondent from the effects of his actions.

"* * *

[fol. 9] "In conclusion the Commissioner finds that the respondent, Delvaille H. Theard, is guilty as charged of forging and uttering a certain promissory note, dated January 2, 1935, in face amount of $20,000.00, purporting to bear the signatures of Olga Wexler and Alys Senn.

"Commissioner further finds that, as a matter of law, the abnormal mental condition of the respondent at the time of such forgery and utterance does not constitute a defense to disbarment proceeding therefor.

"Accordingly, the Commissioner has no alternative but to recommend to the Supreme Court of Louisiana that a decree of disbarment be entered herein; and that the Court

order the name of Delvaille H. Theard be stricken from the roll of attorneys permitted to practice before that Court."

Now, in opposing the Commissioner's report, respondent first assigns error to the conclusion that the abnormal mental condition existing at the time of the commission of the wrongful acts does not constitute a defense to disbarment.

Influencing that conclusion, as the Commissioner points out, were certain pronouncements of this court made in connection with our consideration of respondent's tendered and overruled exceptions to the petition, they having been as follows: "* * * we do not view the mental deficiency of a lawyer at the time of his misconduct to be a valid defense to his disbarment. Strangely enough, counsel for respondent apparently — taken it for granted that, because evidence has been produced indicating that respondent was probably suffering from amnesia and other mental deficen-[fol. 10] cies at the time of his misdeeds, his insanity (*which we will concede for purposes of this discussion*) operates as a complete bar to this proceeding.

"We think that counsel is mistaken in his assumption. * * * One of the qualities requisite for admission to the bar is that the applicant be of good moral character. When a lawyer has committed peculations, forgeries and breaches of trust, he violates the oath he has taken to demean himself honestly in his practice and the good character he possessed no longer exists. And it will not do for respondent to say that he was suffering from a mental aberration or amnesia depriving him of the ability to distinguish between right and wrong. In disbarment, unlike criminal prosecution or a civil suit for recovery of money based on an offense or quasi offense, consideration of the interest and safety of the public is of the utmost importance for, whereas it may not be humane to punish by confinement to prison one who labored under the inability to understand the nature of his wrongful acts, it is quite another matter to permit such a person to continue as an officer of the court and to pursue the privilege of engaging in the honorable profession of counsellor-at-law when he, by his misconduct, has exhibited a lack of integrity and common honesty. *And in our opinion it matters not whether the dishonest conduct*

stems from an incapacity to discern between right and wrong or was engendered by a specific criminal intent." (Italics ours)

Respondent's counsel now argues that the quoted pronouncements and rulings relating to the exception to the petition were merely interlocutory; that they did not con- [fol. 11] stitute the "law of the case"; and that, consequently, they were not binding on the Commissioner in his consideration of the matter. We are unable to agree; and the three cases cited by counsel do not sustain the argument, they being Levy v. Wise et al., 15 La. Ann. 38, Culverhouse v. Marx, 38 La. Ann. 667 and Cusachs v. Dugue et al., 113 La. 261, 36 So. 960. In each of those cases the court considered the question of whether a district judge has the right to revise an interlocutory decree, when the matter affected by it is brought up anew in proper form, and held that he is so empowered. With respect to an appellate court the doctrine prevailing is that its final ruling on an exception is the "law of the case" as to the point covered. See Cusachs v. Dugue, supra, Jacob et al. v. Rochel et al., 164 La. 114, 113 So. 786, State ex rel. Navo v. Baynard, 179 La. 785, 155 So. 225, City of Gretna v. Aetna Life Insurance Company, 207 La. 1085, 22 So. 2d 658.

But if the doctrine were otherwise we know of no good reason for changing our previous ruling. It appears to be logically sound; it is supported by competent authority; and no holdings to the contrary have been brought to our attention.

Under a general heading, entitled "A Commissioner's report should be rejected which does not include findings of all pertinent facts and does not conclude all issues of law", respondent lists in his opposition three complaints which we shall consider in reverse order. It is said: "The Commissioner made no findings of fact on evidence tendered to prove that all of respondent's records had been taken out [fol. 12] of his custody under writs issued long years since." If the issue in this proceeding were whether or not the respondent had committed the wrongful acts with which he is charged, and the missing records were material thereto, the complaint would be justified. But he has admitted the forgery offense and, consequently, the matter of

the loss of some of his records seems irrelevant and unimportant here.

Next he complains: "The Commissioner expresses no conclusion on the legal point that it is essentially unjust to require respondent to defend himself against charges brought more than fourteen years after occurrence of the acts involved in the accusation, and where such acts are not corroborative of recent conduct." The same legal point was advanced in this court on the previous hearing of the exceptions to the petition particularly in connection with the one in which respondent had pleaded prescription and laches. There we observed and ruled:

"The fifth exception of respondent is that of prescription, laches and estoppel. It is asserted that, since the acts complained of occurred more than 17 years ago, the offense is so stale that it would be inequitable and unjust to permit the prosecution of the proceeding and, further, that respondent would be highly prejudiced in defending the suit after the passing of such a great length of time.

"The exception cannot be sustained. Our law of prescription is purely statutory and the fact that a long time has elapsed between the commission of the acts and the bringing of the charges does not, of itself, provide a just [fol. 13] ground for dismissing the suit. Indeed, it appears that respondent was confined to an insane asylum for several years and that he was under a judgment of interdiction from June 1941 until May 7th, 1948, during which time the Committee was unable to act. If respondent has been prejudiced by the delay, this is a matter which can be shown on the merits of the case."

Supplementary to the quoted observations, it may be pointed out that in 1937 a Bar Committee sought to investigate complaints of misconduct on the part of respondent, but action thereon was deferred indefinitely at the request of his uncle who stated that the nephew was then in the insane asylum and interdiction proceedings were pending (they were instituted August 4, 1936).

Although the exception of prescription and laches was overruled, to which ruling we adhere for we are convinced that it was correct, respondent was reserved the right to

show on the merits that he was unjustly prejudiced by the lapse of time. But there is nothing in the record before us from which we can conclude that the delay resulted in prejudice to him in the preparation of a defense.

Finally, respondent asserts: "The Commissioner disposes of respondent's constitutional pleas by erroneously presuming that they have already been decided adversely to respondent." And in his report the Commissioner states: "The additional plea of unconstitutionality seeks to invoke the 14th Amendment to the United States Constitution as a defense. It is claimed that the disbarment of the respondent herein would be a deprivation of his sub-
[fol. 14] stantive rights in violation of that Amendment. This plea is substantially the same as that found in Article IV of respondent's 'Answer with reservation of Exceptions', filed herein and also Article IV of respondent's 'Petition for Reconsideration of Exceptions'. The Court had that answer and that petition before it when a rehearing was denied on January 12, 1953. Your Commissioner must presume that the Court has already considered the constitutional point thus raised and has decided it adversely to the respondent."

The mentioned constitutional pleas were not directly passed upon by us heretofore for the reason that they were offered for the first time in the application for a rehearing on the exceptions to the petition. However, they appear to be without merit. The pleas, quoted above and as we appreciate them, assume that a license to practice law is a natural or a constitutionally granted right. But the assumption is erroneous. As said in 7 Corpus Juris Secundum, verbo Attorney and Client, Section 4(b): "The right to practice law is not a natural or constitutional right, nor an absolute right or a right de jure, but is a privilege or franchise. The right to practice law is not 'property,' nor in any sense a 'contract,' nor a 'privilege or immunity,' within the constitutional meaning of those terms. It cannot be assigned or inherited, but must be earned by hard study and good conduct." See also 5 American Jurisprudence, verbo Attorney at Law, Section 14; State v. Rosborough, 152 La. 945, 94 So. 858; Ex Parte Steckler et al., 179 La. 410, 154 So. 41; In Re Mundy, 202 La. 41, 11

So. 2d. 398; Meunier v. Bernich et al. (La. Court of Appeal), 170 So. 567.

[fol. 15] In the brief of respondent's counsel it is said "that the right to practice law, once granted, does fall under constitutional protection", as is made clear by decisions of the United States Supreme Court in Ex Parte Garland, 4 Wall. 333, 18 L. Ed. 366, and Ex Parte Robinson, 19 Wall. 505, 22 L. Ed. 205. What those decisions stand for, as we read them, is shown by the following extract taken from the latter: "* * * Before a judgment disbarring an attorney is rendered, he should have notice of the grounds of complaint against him and ample opportunity of explanation and defense. This is a rule of natural justice and should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property. * * *"

In the quoted extract the court is not holding that the practice of the profession is a natural, constitutional, or property right. Rather, it is announcing that natural justice requires that an attorney be notified and heard before he is deprived of the privilege of practicing his profession. We agree thoroughly with this principle, and we believe that the stated requirement has been fully met in the instant proceeding.

Petitioner herein (the above named Committee) excepts to that part of the Commissioner's report which holds that respondent "was suffering under an exceedingly abnormal condition, some degree of insanity." It alleges, in its exception, "that, on the contrary, the evidence abundantly shows that he deliberately and *conciously*, and with malice [fol. 16] aforethought, attempted to simulate and feign, and did so simulate and feign, the genuine signature of the alleged makers of the mortgage note, which he now admits was forgery." However, in view of the conclusion reached and hereinabove declared, we need not determine the Committee's exception.

For the reasons assigned it is ordered, adjudged and decreed that the name of Delvaille H. Theard, respondent herein, be stricken from the roll of attorneys and his license to practice law in Louisiana be, and the same is

hereby, cancelled. Respondent shall pay all costs of this proceeding.

Rehearing Refused April 26, 1954.

IN UNITED STATES DISTRICT COURT

ANSWER OF DELVAILLE H. THEARD TO DISBARMENT PROCEEDINGS—Filed May 29, 1954

To the Honorable the United States District Court for the Eastern District of Louisiana:

Comes Delvaille H. Theard, herein notified of a motion and order of date May 19, 1954, wherein appearer is informed that, in view of the decree and opinion of the Supreme Court of Louisiana in the matter of Louisiana State Bar Association v. Delvaille H. Theard, No. 40,891 of the docket of said Court, an order for appearer's disbarment [fol. 17] as an attorney at law and officer of this Court will be entered unless good cause to the contrary is shown by appearer.

And for answer and to show cause, appearer now respectfully submits and says:

The judgment of the Supreme Court of Louisiana, although technically final, is subject to being recalled and reversed and therefore should not at the present time be considered by this Court as a basis for an order of disbarment against appearer. Appearer, in accordance with 28 U.S.C. Sect. 2101 (f), has presented an application to the Supreme Court of Louisiana, praying that the execution and enforcement of its said decree against appearer should be stayed for a reasonable time to enable appearer to obtain a writ of certiorari from the Supreme Court of the United States. Said application for a stay, although filed on May 12, 1954, in said Louisiana Supreme Court, is at the time of the present writing (May 28, 1954) under advisement and not yet acted on. As stated in "Supreme Court Practice" (Stern and Gressman, 1950), p. 189, "generally, the lower Courts are willing to stay the issuance of their mandates pending the filing of a petition for cer-

tiorari." Appearer knows of no reason why his application for stay should be denied. Appearer shows that it would be regrettable that this Court should undertake to act in the present matter adversely to appearer's rights, as long as the decree of disbarment is susceptible not only of being stayed but of being reversed by the United States Supreme Court. The Louisiana Supreme Court has been [fol. 18] informed of appearer's intention to apply for certiorari as permitted by 28 U.S.C. 2101 (c). Further, appearer begs to state that, even should his application for stay and enforcement of its decree be not granted by the Louisiana Supreme Court, this will not preclude his application for review by certiorari by the United States Supreme Court (Carr v. Zaga, 283 U.S. 52, 51 S. Ct. 360, 75 L. Ed. 836), and said application will be duly proceeded with.

For the above reasons, appearer shows to this Court that it would be unwise and it certainly is unnecessary, that mover's application should be considered at the present time, but that this Court should defer consideration of the matter until it is known that appearer is without further redress or opportunity for relief in the premises.

And appearer further shows that the opinion and decree of the Louisiana Supreme Court does not present, as appearer avers most respectfully, any appropriate or just basis for his disbarment.

At every stage of the proceedings for his disbarment in the State Court, appearer duly and properly raised the constitutional question involved in the present case. Appearer was disbarred without just cause or reason and by a decree depriving him of his property without due process of law.

If appearer had been disbarred because of misconduct international and reprehensible or for any reason involving moral turpitude or wilful wrong, appearer would not now undertake to show cause why the decree of the Louisiana Supreme Court should not be operative and binding in this Court. But, as clearly appears from a mere reading [fol. 19] of its opinion, the Louisiana Court based its decree of disbarment on an act committed while appearer was the victim of a mental breakdown, utterly bereft of

reason, and unable to distinguish between right and wrong. Thus appearer was disbarred only because he was ill and irresponsible in 1934, and not for any misconduct which is the only ground on account of which in Louisiana disbarment (a matter wholly controlled by the State Constitution, Art. 7, Sect. 10) can be based.

There is at least one decision of the Supreme Court of the United States and some expressions by the individual Justices which give much weight to appearer's argument that a lawyer's business and means of livelihood, although forfeitable by disbarment for misconduct or any reprehensible wilful act, cannot constitutionally be taken from him because at some remote period of his professional life he was afflicted with a mental infirmity, from which, as no one who knows him can doubt and as demonstrated by his conduct personal and professional since 1948, he has now and since that year, happily recovered. Appearer has never been convicted by any Court of any criminal act. True, appearer was a patient at DePaul *Sanitarium*, a hospital for the mentally afflicted, uninterruptedly for seven years (from 1936 to 1943), and for many months thereafter he was in the care and under the medical treatment of the State medical authorites at the East Louisiana Hospital for the Insane at Jackson, Louisiana. But civil interdiction is not a badge of infamy; good character can never be impaired by conceded mental infirmity; and illness in 1934, 1935 and 1936 can furnish no constitutional [fol. 20] reason for depriving a lawyer of his professional license at any time, certainly not in 1954, when, as cannot be denied, his health is again entirely normal.

In Wieman v. Updegriff, decided by the United States Supreme Court on December 15, 1952, in considering a question of disloyalty through membership in an association listed as subversive in the Attorney General's list, the Court said: " . . . knowledge is not a factor under the Oklahoma statute. We are thus brought to the question . . . whether the due process clause permits a state in attempting to bar disloyal individuals from its employ (as professors in a state educational institution) to exclude persons . . . regardless of their knowledge. For, under the statute before us, the fact of membership

alone disqualifies. If the rule be expressed as a presumption of disloyalty, it is a conclusive one . . . There can be no dispute about the consequences visited upon a person excluded from public employment on loyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy . . . indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power . . . It is sufficient to say that constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary and discriminatory".

How aptly this decision applies to appearer's case, where, putting aside all other considerations (see the last paragraph of the decision) the Louisiana Court visited disbarment upon appearer for an act he committed whilst [fol. 21] he was insane and therefore irresponsible. The exclusion of the Oklahoma professors, in the Updegriff case, was annulled because the Oklahoma statute created a conclusive presumption condemning their membership, however innocent in fact, in an association declared to be subversive. How much stronger in justice and common sense is the position of appearer, a lawyer who has been disbarred for an act committed during insanity and therefore without actionable fault. Appearer believes that this Court is not bound by the decree of the Louisiana Supreme Court in the instant case.

That there must be a substantial reason for a decree of professional suspension or disbarment, and that such decree cannot be considered as binding if the act lacks the element of wrongdoing and is insufficient to serve as a basis for judicial condemnation, is, as appearer submits, strongly emphasized in the dissenting opinions of Associate Justices Black, Frankfurter and Douglas, in the case of Dr. Edward A. Barsky, appellant, v. The Board of Regents of the University of the State of New York, decided April 26, 1954.

Barsky served a prison sentence for contempt of Congress because he refused to furnish certain data and records to a Congressional Committee on the ground that they were privileged. He was further suspended for six months by the action of the Department of Education of the State of New York and his appeal from that suspension finally

reached the Supreme Court of the United States. It will be noted that Dr. Barsky at least actually committed a reprehensible act, whereas appearer has been disbarred by [fol. 22] the Supreme Court of Louisiana on account of an illness and an act resulting therefrom, for which he could not in reason or logic be held responsible.

In the Barsky case, Justice Black said: "I have no doubt that New York has broad power to regulate the practice of medicine. But the right to practice is, as Mr. Justice Douglas shows, a very precious part of the liberty of an individual physician or surgeon. It may mean more than any property. Such a right is protected from arbitrary infringement by our Constitution, which forbids any State to deprive a person of liberty or property without due process of law . . . . Our responsibility is, however, broader. We must protect those who come before us, whether the State Court is empowered to do so or not . . . In this case one can only guess why the Regents overruled their Discipline Committee and suspended Dr. Barsky. Of course, it may be possible that the Regents thought that every doctor who refuses to testify before a congressional committee should be suspended from practice. But so far as we know the suspension may rest on the Board's unproven suspicions that Dr. Barsky had associated with Communists. This latter ground, if the basis of the Regents' action, would indicate that in New York a doctor's right to practice rests on no more than the will of the Regents. This Court, however, said many years ago that 'the nature and theory of our institutions of government . . . do not mean to leave room for the play and action of purely personal and arbitrary power . . . For, the very idea that one man may be compelled to hold his life, or any material right essential to the enjoyment of life, [fol. 23] at the mere will of another, seems in any country where freedom prevails . . .' Yick Wo v. Hopkins, 118 U.S. 356, 369-370 . . . (note) Such arbitrary power amounts to a denial of equal protection of the law within the meaning of the Fourteenth Amendment . . .".

Justice Frankfurter, in the *Barsky* case, said: "Of Course, a State must have the widest leeway in dealing with an interest so basic to its well-being as the health of its people. This includes the setting of standards, no mat-

ter how high, for medical practitioners, and the laying down of procedures for enforcement, no matter how strict . . . It is one thing to recognize the freedom which the Constitution wisely leaves to the States in regulating the professions. It is quite another thing, however, to sanction a State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his profession. Implicit in the grant of discretion to a State's medical board is the qualification that it must not exercise its supervisory powers on arbitrary, whimsical or irrational considerations. A license cannot be revoked because a man is redheaded or because he was divorced . . . If a State licensing agency lays bare its arbitrary action . . . that is precisely the kind of State action which the Due Process Clause forbids. See Perkins vs. Elg., 307 U. S. 325, 349-350; also Rex v. Northumberland Compensation Appeal Tribunal (1951), 1 K. B. 711. The limitation against arbitrary [fol. 24] action restricts the power of a State 'no matter by what organ it acts'. Missouri v. Dockery, 191 U. S. 165, 171".

And in the Barsky case, Justice Douglas said: "The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on Politics, 'A man has a right to be employed, to be trusted, to be loved, to be revered'. It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man . . . The Bill of Rights does not say who shall be doctors or lawyers or policemen. But it does say that certain rights are protected, that certain things shall not be done. And so the question here is not what government must give, but rather what it may not take away. The Bill of Rights prevents a person from being denied employment as a teacher who though a member of a 'subversive' organization is wholly innocent of any unlawful purpose or activity. Wie-

man v. Updegraff, 344 U. S. 183 . . . In this case it is admitted that Dr. Barsky's 'crime' consisted of no more than a justifiable mistake concerning his constitutional rights" (Appearer's 'crime' according to the decision of the Louisiana Supreme Court, was the commission of an act while [fol. 25] insane, and on account of which he was totally irresponsible) "Such conduct is no constitutional ground for taking away a man's right to work . . . Neither the security of the State nor the well-being of her citizens justifies this infringement of fundamental rights."

As stated, appearer Theard with great industry has since 1948 practised his profession, as quoted by the Supreme Court at page 4 of its opinion "without any complaint levelled at his conduct". The Courts in Louisiana have had numerous opportunities during the last six years to observe appearer, both in his private, every-day conduct, and in the discharge of his rather numerous professional pursuits. Attached is a list of the cases he has since 1948 argued in the Louisiana Supreme Court and the Court of Appeal for the Parish of Orleans. This list reflects his capacity to render service in many types of litigation, and demonstrates his complete mental restoration; for trial work both at nisi prius and on appeal is truly taxing and can be performed regularly and constantly over a period of years only by a person like appearer now happily in the possession of a good physique, a sound mind and stable nerves.

Wherefore, the premises considered, appearer Delvaille H. Theard prays that it may please this Court to give consideration to the matters herein set forth; that appearer be permitted to argue his defense orally according to the rules and usages in such matters and to furnish a written Brief if such be deemed necessary; and that, in due course, the Order herein to show cause, of date May 19, 1954, be recalled and rescinded.

[fol. 26] Respectfully submitted,

(S.) Delvaille H. Theard, In Propria persona.

New Orleans, May 29, 1954.

Copy served on George R. Blue, United States Attorney.
(S.) Delvaille H. Theard.

LIST OF CASES ARGUED BY RESPONDENT

Doll v. Dearie et al., Orleans Court of Appeal, 37 So. 2d 61.

Doll v. Dearie et al., Orleans Court of Appeal, 37 So. 2d 608.

Doll v. Meyer, 214 La. 444, 38 So. 2d 69.

State, ex rel. Lucas, v. Hickey, 214 La. 711, 38 So. 2d 395.

Bonnelucq v. Bernard, Orleans Court of Appeal, 39 So. 2d 447.

Doll v. Dearie et al., Orleans Court of Appeal, 39 So. 2d 641.

Fried v. Edmiston, Orleans Court of Appeal, 40 So. 2d 489.

McDaniels v. Doll, Orleans Court of Appeal, 40 So. 2d 530.

Bonnelucq v. Bernard, Orleans Court of Appeal, 41 So. 2d 88.

Doll v. Dearie, Orleans Court of Appeal, 41 So. 2d 84.

Doll v. Sewerage and Water Board of New Orleans, Orleans Court of Appeal, 43 So. 2d 158.

State, ex rel. Warren Realty Company, Inc., v. Montgomery, State Tax Collector, Orleans Court of Appeal, 43 So. 2d 33.

Doll v. R. P. Farnsworth & Co., Inc., Orleans Court of Appeal, 49 So. 2d 354.

Fried v. Edmiston, 218 La. 522, 50 So. 2d 19.

Hardie v. Allen et al., Orleans Court of Appeal, 50 So. 2d 74.

Cresap v. Kilpatrick, Orleans Court of Appeal, 51 So. 2d 130.

Cohen v. Grace, 219 La. 91, 52 So. 2d 297.

[fol. 27] Mayerhefer v. Louisiana Coca Cola Bottling Co., Ltd., 219 La. 320, 52 So. 2d 866.

Alpaugh v. Krajcer, Orleans Court of Appeal, 54 So. 2d 233.

Doll v. R. P. Farnsworth & Co., Orleans Court of Appeal, 55 So. 604.

Brewer v. Cowan, 220 La. 189, 56 So. 2d 149.

Alpaugh v. Krajcer, Orleans Court of Appeal, 57 So. 2d 700.

Doll v. Untz, Orleans Court of Appeal, 57 So. 2d 55.
Doll v. Montgomery, Orleans Court of Appeal, 58 So. 2d 573.
Levenson v. Chancellor et al., Orleans Court of Appeal, 58 So. 2d 839.
Doll v. City of New Orleans, 221 La. 446, 59 So. 2d 449.
Fox v. Doll, 221 La. 427, 59 So. 2d 443.
Doll v. Montgomery, Orleans Court of Appeal, 60 So. 2d 907.
Housing Authority v. Doll, 222 La. 933, 64 So. 2d 224.
State, ex rel. Warren Realty Co., Inc., v. City of New Orleans, 223 La. 719, 66 So. 2d 785.
Doll v. McMorries, Orleans Court of Appeal, 67 So. 2d 750.
Levenson v. Chancellor, Orleans Court of Appeal, 68 So. 2d 116.
Housing Authority of New Orleans v. Doll, 67 So. 2d 522.
City of New Orleans v. Doll, La. So. 2d (not yet reported).
State, ex rel. Warren Realty Company, Inc., Orleans Court of Appeal, S. 2d (not yet reported).
Succession of John Albion Saxton, Orleans Court of Appeal, S. 2d (now pending on application for rehearing).

IN UNITED STATES DISTRICT COURT

HEARING ON RULE FOR DISBARMENT AND ORDER MAKING RULE ABSOLUTE—March 16, 1955

CHRISTENBERRY, J:

Minute Entry

This cause came on this day for hearing on rule for [fols. 28-30] disbarment of Delvaille H. Theard.

Present: Delvaille H. Theard, In proper person; Hepburn Many, Asst. U. S. Attorney; James G. Schillin, Committee on Professional, Ethics and Grievenances.

Benjamin Y. Wolf

After hearing argument of the parties herein, it was ordered by the Court that the rule for disbarment of Del-

vaille H. Theard be and the same is hereby made absolute, and that his name be removed from the roll of attorneys of this Court.

[fol. 31] IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS—Filed May 2, 1955

1. A proceeding for disbarment in the federal court cannot be maintained when, as in the present case, it is based exclusively on the decree of a state court, which itself cannot be supported either in law or reason and which, with-
[fol. 32] out substantive due process, deprived the defendan of his property right to practice his profession.

2. The Louisiana Supreme Court had already decided, as to this very defendant (State v. Theard, 212 La. 1022, 34 So. 2d 248) that, since his unfortunate mental breakdown and condition of irresponsibility was a circumstance over which he had no control, it would be unfair to impose on him the penalty to be suffered only by one whose act was intentional and deliberate.

3. Nevertheless, the same Court in disbarring defendant held that it mattered not whether the act complained of stemmed from an inc-pacity to discern between right and wrong or was engendered by a specific criminal intent. Thus, although the Supreme Court had previously held that defendant's insanity was a condition which demanded appropriate consideration, defendant's disbarment was decreed despite his mental irresponsibility, his inability to discern between right and wrong and the fact that the act complained of was neither intentional, deliberate nor willful.

4. Further, since in Louisiana disbarment is statutory (La. Const. Art. 7, Sect. 10) and a lawyer can be disbarred only for willful misconduct (Supreme Court Rules, Rule 13, Sects. 4 and 5), and since obviously an insane person cannot be guilty of willful misconduct, was it proper, just, logical or legal, seventeen years after his illness, when the defendant had regained his health and the full possession of his mental faculties and actively resumed the practice
[fol. 33] and tried forty-seven litigated appeals in the Or-

leans Court of Appeal and the Louisiana Supreme Court without the slightest question or criticism from anyone,—to disbar him in the year 1954 for an act which he committed whilst insane in 1935?

5. A license to practice one of the learned professions constitutes property. To revoke the license of a lawyer, now completely recovered from all mental infirmity, for the sole reason that eighteen years previously he committed an insane act, constitutes an insubstantial and illegal deprivation, without due process, of the lawyer's property right to practice his profession. It exemplifies that indiscriminate classification of innocent with knowing activity condemned by the United States Supreme Court as an assertion of arbitrary power depriving a person arbitrarily and without due process of the right to practice his profession. Robert M. Wieman et al. v. Paul W. Updegraff et al., 344 U.S. 183, 97 L. Ed. 216, 73 Sup. Crt. 215.

6. The disbarment action against defendant was filed in the Louisiana Supreme Court in 1952, seventeen years after the commission of the insane act on January 2, 1935. The defendant pleaded the liberative prescription of ten years (Revised Civil Code of Louisiana, Article 3544), which an earlier Louisiana Supreme Court had referred to as seemingly applicable to actions of disbarment (State v. Fourchy, 106 La. 744, at pages 756, 758; 31 So. 325). The Court referred to defendant's plea, declared that in Louisiana prescription is statutory, refrained from noticing the cited Codal article and the Fourchy decision, and [fols. 34-36] without further discussion of this all-important point, overruled all of defendant's exceptions.

7. It is universally conceded that disbarment is not by way of punishment but is motivated for the protection of the public and to maintain a proper level of professional standards and responsibility. The defendant, undoubtedly subject to insanity and not responsible for his act in 1935, as found and reported by the Master appointed by the Louisiana Supreme Court to hear the testimony in the State disbarment suit, had happily regained his health and was decreed to be fully cured and competent in 1948 by the Judgment (after a full hearing) of the Civil District Court for the Parish of Orleans which thereupon canceled his civil interdiction. From that time (1948) and until the decree

for his disbarment in 1954, defendant's active and irreproachable professional conduct and pursuits have conclusively demonstrated his present complete responsibility and restoration to normal health. It cannot now be claimed seriously or in good faith that, for the purpose of protecting the public, the defendant, who is now in every way competent and responsible, should at the present time be deprived of the right to practice his profession in the Courts of the United States.

(S.) Delvaille H. Theard, pro se.

CERTIFICATE OF SERVICE

[Omitted in Printing]

[fol. 37] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 38] **Proceedings in the United States Court of Appeals for the Fifth Circuit**

That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION—December 5, 1956

No. 15584

DELVAILLE THEARD,

versus

UNITED STATES OF AMERICA

On this day this cause was called and, after argument by Delvaille H. Theard, Esq., in propria persona, for appellant, and M. Hepburn Many, Esq., Assistant United States Attorney and James G. Schillin, Esq., for appellee, was submitted to the Court.

[fol. 39] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15584

DELVAILLE H. THEARD, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Eastern District of Louisiana.

OPINION—January 6, 1956

Before HUTCHESON, Chief Judge, and BORAH and BROWN, Circuit Judges.

PER CURIAM: In disbarment proceedings which were had before the Supreme Court of Louisiana, appellant's name was ordered stricken from the roll of attorneys and his license to practice law in Louisiana was cancelled.[1] Thereafter, and by reason of the foregoing, the United States [fol. 40] Attorney filed against appellant in the District Court a rule for disbarment pursuant to Rule 1 (f) of the General Rules of the United States District Court, which, in pertinent part, provides:

> "Whenever it is made to appear to the court that any member of its bar has been disbarred or suspended from practice or convicted of a felony in any other court, he shall be suspended forthwith from practice before this court and, unless upon notice, mailed to him at his last known place of residence, he shows good cause to the contrary within 10 days, there shall be entered an order of disbarment, or of suspension for such time as the court shall fix."

Upon consideration of the motion and the attached certified copy of the opinion and decree of the State Supreme Court the District Judge entered an order suspending the appellant from practice and further ordered that unless

[1] 225 La. 98, 72 So. 2d 310, cert. den. 348 U. S. 823.

appellant show good cause to the contrary within ten days the rule would be made absolute and an order for his disbarment would be entered.

Within the period prescribed appellant filed an answer in which he advanced numerous arguments in support of his basic contention and defense that the opinion and decree of the Louisiana Supreme Court does not present any appropriate or just basis for his disbarment.

The cause came on for hearing on the motion of the U. S. Attorney and appellant's answer and after hearing arguments the District Judge ordered that the rule of disbarment be made absolute and that appellant's name be stricken from the roll of attorneys.

[fol. 41] We are in no doubt that the order of the District Court must be affirmed. Appellant had the burden throughout these proceedings of showing good cause why he should not be disbarred. He offered no evidence and the legal contentions which he urges upon us are not persuasive.

Affirmed.

[fol. 42] In United States Court of Appeals

No. 15584

Delvaille H. Theard,

versus

United States of America

Judgment—January 6, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[fols. 43-59] Petition For Rehearing Covering 17 Pages Filed Omitted From this Print. It Was Denied, and Nothing More by Order—January 31, 1956.

[fol. 60] In United States Court of Appeals

[Title omitted]

Order Denying Rehearing.—January 31, 1956

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 61] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 62] Supreme Court of the United States

[Title omitted]

Order Allowing Certiorari.—Filed June 4, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.